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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

U.S. ALLIANCE GROUP, INC., a California corporation,

Plaintiff,

v.

NCR CORPORATION, a Delaware corporation; DOES 1 - 25, inclusive, jointly and severally,

Defendants.

Case No. 8:22-CV-00980-FWS(KESx)

DEFENDANT NCR CORPORATION'S SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES TO MOTION TO DISMISS

Hearing Date: July 28, 2022
Time: 10:00 a.m.
Courtroom: 10D
Judge: Hon. Fred W. Slaughter

State Complaint filed April 1, 2022
Removed: May 12, 2022

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INTRODUCTION

Plaintiff's claims against NCR are based on NCR's acquisition of two non-party foreign companies months after those two companies stopped doing business with Plaintiff. NCR is not "at home" in California and therefore not subject to general jurisdiction in this forum. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014). Moreover, Plaintiff's claims do not arise out of or relate to any forum-related contact, purposeful or otherwise, by NCR. Accordingly, NCR is not subject to specific jurisdiction in this case, which should be dismissed in its entirety under Rule 12(b)(2).

Moreover, Plaintiff's bald and conclusory allegations fail to allege a claim for relief against NCR. Plaintiff's antitrust and unfair competition claims fail because, among other things, Plaintiff fails to allege antitrust injury and therefore standing to sue, a plausible relevant market, or sufficient facts to show that NCR engaged in any unlawful conduct. Moreover, the conduct of which Plaintiff complains is procompetitive. With regard to Plaintiff's state-law tort and constructive trust claims, Plaintiff has failed to allege facts required to support each of these claims.

Plaintiff admits that it has no facts showing NCR's involvement in the conduct that allegedly harmed Plaintiff, alleging without explanation that it hopes to obtain such facts in discovery. This Court should deny Plaintiff's improper attempt to use the Court's discovery powers to harass NCR and conduct a fishing expedition, and, given that the Complaint is still legally insufficient despite having been amended, dismiss Plaintiff's claims with prejudice.

STATEMENT OF RELEVANT FACTS

The First Amended Complaint ("Complaint") alleges that Plaintiff, a California citizen, provides a variety of electronic payment processing services, including cryptocurrency processing services. (First Am. Compl. ¶ 21) ("FAC").[1]

[1] Although the Court must accept the well-pleaded factual allegations of the Complaint as true solely for purposes of this motion to dismiss, the Court should

Between 2008 and March 15, 2021, Plaintiff alleges what amounted to an annual, renewable contract with Cardtronics USA, Inc. ("Cardtronics"), a company that purportedly operated over 200,000 ATMs in the United States and that also provided different types of payment processing services. (¶¶ 8, 36-37). Pursuant to this contract, Plaintiff referred merchants to Cardtronics, which provided processing services on the consumer side, or "frontend," of ATM transactions. (¶¶ 38-40). To settle and complete the full ATM transaction, Plaintiff provided processing services on the merchant side, or "backend," of ATM transactions for merchants that it referred to Cardtronics. (¶ 40).

In July 2017, Plaintiff entered into a contractual relationship with LibertyX, a "cryptocurrency group," to provide that company with ATM processing services for cryptocurrency transactions. (¶¶ 7, 44-45). In the same month, Plaintiff began providing LibertyX cryptocurrency accounts to Cardtronics, for it to provide ATM processing services. (¶ 46). Plaintiff claims that it developed LibertyX's cryptocurrency business into 28,484 "Crypto-ATM merchant locations." (¶ 49). Plaintiff alleges without explanation that it had "a 5% interest," "contractual 5% interest," or "vested business interest" in LibertyX. (¶¶ 7, 69, 75).

On March 15, 2021, Cardtronics ended its business relationship with Plaintiff. (¶ 51). On March 17, 2021, LibertyX provided notice to USAG that it was terminating "most" of its agreements with USAG. (¶ 52).

On June 21, 2021, NCR acquired Cardtronics and on January 13, 2022, acquired LibertyX. (¶¶ 25, 29, 63, 64). Plaintiff admits that "NCR had absolutely no foothold in the crypto-ATM market" prior to these acquisitions. (¶ 31). The Complaint alleges in bald general statements and legal conclusions that NCR was

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disregard "general and conclusory" allegations, which comprise all or almost all of the allegations against NCR, including in assessing whether NCR is subject to personal jurisdiction in this case. *See Parnell Pharms., Inc. v. Parnell, Inc.*, No. 5:14-CV-03158-EJD, 2015 WL 5728396, at *4 (N.D. Cal. Sept. 30, 2015) (disregarding "general and conclusory allegations" in personal jurisdiction analysis).

involved in the ending of Plaintiff's relationship with Cardtronics and LibertyX. (¶¶ 9, 34-35, 53-62). The Complaint does not allege facts supporting its conclusory allegations, instead alleging that Plaintiff hopes to find such information in discovery. (¶¶ 57, 61, 73).

With regard to the Court's personal jurisdiction over NCR, Plaintiff, a California resident, alleges that it suffered harm in California but does not allege facts connecting NCR to such harm. Although alleging that "a substantial part of the events or omissions" giving rise to Plaintiff's claims occurred in this district, where NCR "aimed its acts," (¶ 20), Plaintiff does not allege any supporting facts for these conclusions. NCR is incorporated in Maryland and has its principal place of business in Georgia. (Declaration of Donald W. Layden, Jr., Exhibit A at ¶ 3). Before and after its acquisition by NCR, Cardtronics was a Delaware corporation with its principal place of business in Texas; similarly, LibertyX was a Delaware corporation with its principal place of business in Florida. (Ex. A at ¶¶ 5, 7). Plaintiff does not allege that NCR's acquisitions occurred in or were intentionally directed to California; in fact, none of NCR's actions taken in connection with these acquisitions occurred in or were specifically directed at California. (*Id.* at ¶¶ 6, 8).

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER NCR.

A. LEGAL STANDARD.

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(2) if the Court lacks personal jurisdiction over a party to the suit, which Plaintiff bears the burden of establishing. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015). This Court has general jurisdiction over a foreign corporation, such as NCR, to "hear any and all claims against" it when such a corporation is "essentially at home in the forum State." *Daimler AG*, 571 U.S. at 127 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). A corporation is "at home" for purposes

of general jurisdiction in the state or states where it is incorporated and where it has its principal place of business. *Daimler AG*, 571 U.S. at 139 n. 19; *see also Goodyear*, 564 U.S. at 924 (holding that the "paradigm forum" for general jurisdiction over a corporation is the place of incorporation or principal place of business)

"Specific jurisdiction, on the other hand, depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State." *Goodyear*, 564 U.S. at 919 (alteration in original) (citation omitted). In order to exercise specific jurisdiction, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (citation omitted).

Three requirements must be met for the exercise of specific jurisdiction: "(1) the defendant must either 'purposefully direct his activities' toward the forum or 'purposefully avail[ ] himself of the privileges of conducting activities in the forum'; (2) 'the claim must be one which arises out of or relates to the defendant's forum-related activities'; and (3) 'the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.'" *Id.* (alteration in original) (citation omitted). The "purposeful direction test" of the first element, which applies to the claims alleged here, requires a plaintiff to show that the "defendant must have '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" *Id.* at 1069 (citation omitted) (tort claims); *Fleury v. Cartier Int'l*, No. 05-CV-4525-EMC, 2006 WL 2934089, at *2 (N.D. Cal. Oct. 13, 2006) (antitrust claims).

In determining jurisdiction here, the Court should disregard Plaintiff's general statements and conclusory allegations. *See Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 n.5 (9th Cir. 2017) (disregarding "conclusory legal statement unsupported by any factual assertion" in jurisdictional analysis).

B. THIS COURT LACKS GENERAL JURISDICTION OVER NCR BECAUSE IT IS NOT AT HOME IN CALIFORNIA.

NCR is not "at home" in California because it is not incorporated in and does not have its principal place of business in the state. As a result, this Court does not have general jurisdiction over NCR to hear the claims alleged in the Complaint. *See Daimler AG*, 571 U.S. at 127, 139 n.19. While general jurisdiction "does not lie just because a defendant 'engages in a substantial, continuous, and systematic course of business' in the forum," the Complaint here does not even allege facts showing that much as to NCR. *Vallarta v. United Airlines, Inc.*, 497 F. Supp. 3d 790, 799 (N.D. Cal. 2020) (quoting *Daimler AG*, 571 U.S. at 138-39); *see also Goodyear*, 564 U.S. at 927 ("A corporation's 'continuous activity of some sorts within a state,' is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.") (citation omitted).

Plaintiff's bald allegations that NCR is authorized to do and transacts business in California are insufficient for this Court to exercise general jurisdiction over NCR. *See, e.g.*, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (holding that state court lacked jurisdiction over railroad not incorporated or having its principal place of business there, despite over 2,000 miles of track and 2,000 employees in the state); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (affirming finding of no general jurisdiction over defendant who had contracts with California companies worth between $225 and $450 million, sent employees to California, and other business in California); *Caldrone v. Circle K Stores, Inc.*, No. 5:21-CV-749-GW-KK, 2021 WL 6496746, at *4 (C.D. Cal. Aug. 2, 2021) (national brand not at home in state despite extensive business, a regional office, and generation of most profits on certain fuel there); *Vallarta*, 497 F. Supp. 3d at 799 (no general jurisdiction over airline that "conducts substantial business in California through 'two hub airports' . . . and by employing a substantial number of employees" there) (citation omitted); *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 964 (N.D.

Cal. 2015) (no general jurisdiction over national car manufacturer); *Senne v. Kan. City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 1018 (N.D. Cal. 2015) ("cannot be considered home" to any of multiple sports teams that regularly traveled to, conducted business with, engaged in activities in, and have employees based in California); *cf. Dynatrace LLC v. Ramey*, No. 16-CV-01777-EMC, 2016 WL 7157650, at *5 (N.D. Cal. Dec. 8, 2016) (asserting general jurisdiction over party where evidence showed that party's principal place of business was in California).

For the same reasons, Plaintiff has not alleged any facts showing that this is an exceptional case for the exercise of general jurisdiction even though NCR is not at home in the forum. *See, e.g.*, *Martinez*, 764 F.3d at 1070 (citing *Daimler*, 571 U.S. at 139 n.19); *Cahen*, 147 F. Supp. 3d at 965 (finding that plaintiffs did not allege facts "to support the proposition that California can be considered Ford's surrogate place of incorporation or temporary place of business" so as be an exceptional case).

C. THIS COURT DOES NOT HAVE SPECIFIC JURISDICTION OVER NCR BECAUSE PLAINTIFF'S CLAIMS DO NOT ARISE OUT OF NCR'S CONTACTS WITH CALIFORNIA.

Although Plaintiff alleges 12 causes of action against NCR arising from its acquisition of Cardtronics and LibertyX, the Complaint does not allege any "suit-related facts" as to NCR that "create a substantial connection with" California or that satisfy the applicable "purposeful direction" test. *Axiom Foods, Inc.*, 874 F.3d at 1068-69 (citation omitted). Simply put, Plaintiff alleges no facts regarding NCR supporting its bald and conclusory allegations, much less facts sufficient to show an intentional act by NCR expressly aimed at California or forum-related activities giving rise to this suit. *See Evox Prods. LLC v. AOL Inc.*, No. 20-CV-2907-FMO-JEM, 2020 WL 3891457, at *2 (C.D. Cal. Apr. 14, 2020) (finding bald allegation that defendants' "conduct that gives rise to this action has occurred in" California insufficient to assert jurisdiction); *Sec. & Exch. Comm'n v. Jammin Java Corp.*, No.

2:15-CV-08921-SVW-MRW, 2016 WL 6595133, at *2 (C.D. Cal. July 18, 2016) (refusing to accept "unreasonable inferences" or "legal conclusions" and finding no jurisdiction over owners of companies that allegedly engaged in suit-related conduct).

Plaintiff's only factual allegations about NCR concern its purchases of Cardtronics and LibertyX, although Plaintiff alleges no facts showing that these transactions were "expressly aimed" at Plaintiff or California. To the contrary, consistent with the facts that Plaintiff does allege (press releases silent as to Plaintiff and California), these deals did not occur in and were not directed at California. (Ex. A at ¶¶ 5-8). And of course, NCR did not even acquire Cardtronics and LibertyX until *months* after the conduct that Plaintiff alleges harmed it. (FAC ¶¶ 25, 29).

Plaintiff's bald allegations concerning NCR, including that NCR "directed" Cardtronics to port Plaintiff's merchants and give LibertyX access to Plaintiff's information, (FAC ¶¶ 59-60), do not allege that these purported actions were aimed at, occurred in, or connected to California in any way other than that Plaintiff allegedly suffered harm there. That Plaintiff, a California resident, was allegedly harmed by some purported NCR action elsewhere is insufficient to show purposeful direction. *See Walden v. Fiore*, 571 U.S. 277, 290 (2014) ("The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."); *Sciara v. Campbell*, 840 F. App'x 920, 923 (9th Cir. 2020) (holding that express aiming argument resting "on the fact that [plaintiff] is a Nevada resident" is insufficient).

Moreover, Plaintiff's bald, general and conclusory allegations of conspiracy and concerted action do not support jurisdiction because Ninth Circuit courts "have refused to exercise personal jurisdiction over defendants" based on actions by alleged co-conspirators. *Wescott v. Reisner*, No. 17-CV-06271-EMC, 2018 WL 2463614, at *4 (N.D. Cal. June 1, 2018) (collecting cases); *UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.*, No. 14-CV-03466-MMM-JPR, 2015 WL 12752879, at *8

(C.D. Cal. July 2, 2015) (California state and federal courts "have rejected" a conspiracy theory of personal jurisdiction) (collecting cases); *see also Brown v. 140 NM LLC*, No. 17-CV-05782-JSW, 2019 WL 118425, at *5 (N.D. Cal. Jan. 7, 2019) (same). Similarly, allegations of "knowledge and consent" to the actions of others, though Plaintiff does not even allege facts showing this much as to NCR, "do not constitute intentional acts directed at the forum state." *Chirila v. Conforte*, 47 F. App'x 838, 842 (9th Cir. 2002).

Even if the Court were to consider whether conspiracy or concerted action allegations may support the exercise of jurisdiction, the Complaint's allegations regarding NCR are far too broad, general, and conclusory to establish personal jurisdiction here, whether general or specific. *See Krypt, Inc. v. Ropaar LLC*, No. 19-CV-03226-BLF, 2020 WL 32334, at *4-5 (N.D. Cal. Jan. 2, 2020) (finding bare allegations that defendants worked "in concert to design and execute a plan" legally insufficient); *Elite Semiconductor, Inc. v. Anchor Semiconductor, Inc.*, No. 5:20-CV-06846-EJD, 2021 WL 3037701, at *9 (N.D. Cal. July 19, 2021) ("bare allegation" of conspiracy with others who acted in the forum "do[es] not confer jurisdiction"). Nor can Plaintiff establish jurisdiction here based on an alter ego or agency theory because Plaintiff alleges no facts showing the nature of the relationship between NCR and the two companies it eventually acquired (putting aside that such acquisitions happened months after the end of Plaintiff's business with those two companies). *See Williams*, 851 F.3d at 1025 n.5 (9th Cir. 2017) (holding that even assuming such theory survives *Daimler*, plaintiffs did not sufficiently allege facts establish subsidiary was parent's alter ego and did not allege sufficient control to establish agency); *Reynolds v. Binance Holdings Ltd.*, 481 F. Supp. 3d 997, 1004 (N.D. Cal. 2020) (no jurisdiction under alter ego theory where factual allegations did not show unity of interest or other requirements).

This Court should refuse to exercise jurisdiction over NCR here and dismiss this case in its entirety.

II. THE COMPLAINT DOES NOT PLEAD ANY LEGALLY COGNIZABLE CLAIMS AGAINST NCR.

A. LEGAL STANDARD.

Dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011). When considering a Rule 12(b)(6) motion to dismiss, a court must accept well pleaded "factual matter" in a complaint as true, but need not accept "bald allegations" or "legal conclusions," or "naked assertion[s] devoid" of factual enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009) (alteration in original); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating plaintiff must provide "more than labels and conclusions"). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. If the facts alleged do not support a reasonable inference of liability, stronger than a mere possibility, the claim must be dismissed. *Id.* at 678-79; *see also In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (stating a court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences").

B. PLAINTIFF FAILS TO STATE A CLAIM UNDER FEDERAL OR STATE ANTITRUST LAWS.

Plaintiff attempts to contort NCR's legitimate business conduct and independent conduct by Cardtronics and LibertyX into seven antitrust claims, Counts 5-9, 11, and 12, all of which fail as a matter of law. [2]

[2] Because the Cartwright Act is patterned after Sherman Act, "federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act." *Marin Cnty Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976).

1. Plaintiff Does Not Have Antitrust Standing.

Plaintiff's antitrust theory is vague and convoluted at best, shifting throughout the Complaint. In some of the counts, Plaintiff asserts that the basis for antitrust liability is the acquisition agreements between LibertyX, Cardtronics, and NCR. (FAC ¶¶ 119, 122, 126, 131, 161-166). In other parts of the Complaint, Plaintiff insinuates, without any specific allegations in support, that NCR was somehow involved in Cardtronics' and LibertyX's pre-acquisition decisions to terminate Plaintiff, which predated the acquisitions by months. Elsewhere, Plaintiff claims that the "unlawful scheme ***first*** culminated with NCR directing Cardtronics' instant porting of all" 28,484 of Plaintiff's cryptocurrency merchants into a direct processing relationship with LibertyX and Cardtronics. (¶ 59) (emphasis added).

Whatever the theory, Plaintiff lacks standing to sue. The antitrust laws are for 'the protection of *competition*, not *competitors*.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 (1986) (Sherman, Clayton Acts); *see also Cel–Tech Commc', Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186 (1999) (Cartwright Act). To have standing to sue under the federal or state antitrust laws, Plaintiff must allege an antitrust injury, "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants acts unlawful." *Cargill*, 479 U.S. at 109; *see also Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1302 (S.D. Cal. 2009) (quoting *Cellular Plus, Inc. v. Super. Ct. of San Diego Cnty.*, 14 Cal. App. 4th 1224, 1234 (1993)).

Plaintiff claims, variously, that it suffered harm in the form of lost business due to (1) the NCR acquisitions; and/or (2) the Cardtronics and LibertyX terminations and subsequent porting of merchant data, which it claims NCR somehow directed. Neither constitutes antitrust injury. Plaintiff's alleged harm (the loss of the LibertyX business) results from the terminations of the business relationships between Cardtronics, LibertyX, and Plaintiff. Courts have held that the mere termination of business relationships does not constitute antitrust injury. *See Sierra*

Wine & Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132-33 (9th Cir. 1980); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) .

Attempting to couch the terminations as stemming from or related to the acquisitions changes nothing from an antitrust standpoint. Courts have repeatedly explained that mergers and acquisitions often have a negative impact on displaced suppliers and distributors, but that does not constitute antitrust injury, or make the transaction anticompetitive. *Fla. Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372, 1374-75 (11th Cir. 1997). This is true even when the complaining entity is terminated and loses all the business. *Id.* Moreover, courts have held that where, as here, the injury pled is attributable to conduct that could have occurred absent an acquisition, it cannot form the basis for an antitrust claim even under Clayton Act Section 7. *See Eastman Kodak Co. v. Goodyear Tire & Rubber Co.*, 114 F.3d 1547 (Fed. Cir. 1997), *overruled in part on other grounds by Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998) (*en banc*) (holding that where injury was due to conduct that would have occurred absent the acquisition, there was no Clayton Act claim because the injuries "did not occur 'by reason of' that which made the acquisition allegedly anticompetitive"); *see also Reyn's Pasta Bella, LLC v. Visa U.S.A.*, 259 F. Supp. 2d 992, 1003-04 (N.D. Cal. 2003) "[t]he regulation of agreements . . . between business are not contained in the text of section 7 of the Clayton Act, which deals exclusively with acquisitions by businesses."). LibertyX and Cardtronics could have terminated Plaintiff at any time, and Plaintiff would have suffered the same harm. No matter how Plaintiff couches its claim, it has not and cannot plead antitrust injury, so all of its antitrust claims must be dismissed.

2. The Conduct Plaintiff Alleges Is Procompetitive.

The behavior Plaintiff complains of is procompetitive and does not violate the antitrust laws. Plaintiff claims that the basis for the antitrust violations is: (1) the Cardtronics and LibertyX acquisitions (FAC ¶¶ 119, 122, 126, 131, 161-166); and/or (2) Cardtronics, LibertyX and NCR providing services in-house that

Cardtronics and LibertyX previously contracted with Plaintiff to provide. Either way, the conduct constitutes nothing more than a legitimate vertical business integration, which does not violate the antitrust laws.

As Plaintiff admits, NCR had no foothold in the crypto ATM business prior to the Cardtronics and LibertyX acquisitions, (¶ 31), and engaged in the acquisitions to be able to "rapidly deliver a complete digital current [sic] solution to [NCR] customers, including the ability to buy and sell cryptocurrency … and accept digital currency payments across digital and physical channels." (¶ 30). Accordingly, NCR did not compete with either Cardtronics or LibertyX in crypto ATM when it acquired them. This means any agreement or acquisition between LibertyX, Cardtronics, and NCR cannot be horizontal, as Plaintiff alleges, and can only be vertical. *Tomac, Inc. v. Coca-Cola Co.*, 418 F.Supp. 359, 362 (C.D. Cal. 1976).

Vertical integration is generally procompetitive, because it generates efficiencies and tends to lead to lower prices. *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d. 831, 840 (D.C. Cir. 2006); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶1133a (4th and 5th Editions 2015-2021) ("Given the limited grounds for objecting to most vertical mergers, it would be appropriate to presume that the procompetitive gains from new entry outweigh any harmful vertical effects."). In fact, Plaintiff acknowledges that the acquisitions create an efficiency: "consolidating all of the services typically performed by multiple entities." (FAC ¶ 13). Because of the efficiencies created, courts have repeatedly held that vertical integration, absent substantial market power, cannot violate the antitrust laws. *United States v. Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948) (holding that "vertical integration, as such without more, cannot be held violative of the Sherman Act"). As discussed in detail below, NCR did not even participate in the crypto-ATM market prior to the acquisitions and Plaintiff has pled nothing to show NCR acquired substantial power within the alleged market merely through those transactions.

3. Plaintiff Has Not and Cannot Plead an Illegal Agreement Involving NCR.

To sustain a Sherman or Clayton Act conspiracy to monopolize claim or any Cartwright Act claim, as alleged in Counts 6-9, 11, and 12, Plaintiff must plead an illegal agreement involving NCR. *NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, No. 17-CV-5005-LB, 2017 WL 6059299, at *4-5 (N.D. Cal. Dec. 7. 2017) (conspiracy to monopolize requires, among other things, agreement to monopolize); *see also GreenCycle Paint, Inc. v. PaintCare, Inc.*, 250 F. Supp. 3d 438, 447 (N.D. Cal. 2017) (Cartwright Act claim requires "(1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade.'") (citation omitted). As discussed above, NCR's acquisitions of Cardtronics and LibertyX cannot violate the antitrust laws, so neither can be the required illegal agreement.

Plaintiff tries to insinuate that NCR was somehow involved in LibertyX and Cardtronics' decisions to terminate before the acquisitions. Conclusory allegations that NCR "directed" Cardtronics and LibertyX do not suffice to plead an illegal agreement involving NCR. In short, to support an antitrust claim, Plaintiff must allege sufficient specific facts to show that NCR was involved in the termination decisions in a way that would violate the antitrust laws, and Plaintiff has failed to do so. *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1129 (9th Cir. 2015) ("It is not enough merely to include conclusory allegations that certain actions were the result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible.").

This is particularly true where, as here, the allegations track with an innocent explanation, but "do not tend to exclude the innocent explanation." *GreenCycle Paint, Inc.*, 250 F. Supp. 3d at 446-47. The few facts Plaintiff does allege – the terminations, the acquisitions – add up easily to several courses of conduct that do not violate the antitrust laws, none of which Plaintiff offers a single fact to refute.

For example, Cardtronics and LibertyX could simply have decided independent of NCR to stop doing business with Plaintiff and find a new partner, given that the decisions occurred months before the acquisitions. Furthermore, NCR could have simply decided (or even made no conscious decision) to continue operating the two companies as they were operating when NCR acquired them in August 2021 and January 2022, *i.e.*, without Plaintiff's business. Alternatively, Cardtronics, LibertyX and NCR could have jointly decided to terminate the contracts in anticipation of running the business without USAG, which contrary to USAG's suggestion, does not actually violate the antitrust laws, as discussed below. None of these scenarios suffices to state an antitrust violation, and because the Complaint does not show that some illegal interpretation is more likely, the claims fail as a matter of law.

4. Plaintiff Has Failed to Plead a Plausible Relevant Market.

To plead a viable antitrust claim under the Sherman, Clayton, or Cartwright Acts, Plaintiff must plead a plausible relevant market that is not "facially unsustainable." [3] *Dang v. S.F. Forty Niners*, 964 F. Supp. 2d 1097, 1104 (N.D. Cal. 2013) (Sherman and Cartwright Acts); *see California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1118 (N.D. Cal. 2001) (Clayton Act Section 7 claims). A properly-pled relevant market contains "the product at issue as well as all economic substitutes for the product." *In re German Automotive Manufacturers Antitrust Litigation*, 497 F. Supp. 3d 745, 756-57 (N.D. Cal. 2020). "[A] plausible market requires . . . facts explaining why seemingly similar products excluded from the market are not substitutes for those in the market." *Reilly v. Apple Inc.*, No. 21-cv-04601-EMC, 2022 WL 74162, at *6 (N.D. Cal. Jan. 7, 2022). Plaintiff's "crypto

[3] "[A] plaintiff . . . must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Given that NCR did not even have a "foothold" in crypto ATM, Plaintiff cannot plausibly claim NCR plays enough of a role to "impair competition significantly."

ATM market" fails to meet these standards.

Plaintiff references a multitude of products and services allegedly implicated here: crypto ATM machines, frontend, and backend processing, "cryptocurrency software," and "a complete digital currency solution to customers." (FAC ¶¶ 28, 39-40). Based on these allegations, Plaintiff's "crypto ATM market" seems to be an amorphous soup of products and services provided to merchants and/or consumers related to purchasing of cryptocurrency through ATMs, with no allegations as to whether an actual consumer would consider those items substitutes. Plaintiff does not explain how these different products and services are substitutes. Nor does Plaintiff explain how products and services targeted to merchants (processing) can share a market with products and services targeted to consumers (buying cryptocurrency at an ATM). The "crypto ATM market" therefore fails as a matter of law. *Reilly*, 2022 WL 74162, at *6.

Moreover, Plaintiff's own allegations suggest that the relevant market may be far broader than any products or services related to ATMs. Consumers can buy and sell cryptocurrency through a variety of different means. As Plaintiff admits, Liberty X's "digital currency solution runs on ATMs, kiosks and point-of-sale (POS) systems today." (FAC ¶ 32). Plaintiff further quotes NCR as planning to develop a digital currency solution "including the ability to buy and sell cryptocurrency … and accept digital currency payments across digital and physical channels." (¶ 30). Plaintiff offers no allegations explaining why these other methods are not substitutes for cryptocurrency transactions done through ATMs, as they must to plead a plausible relevant market. *Reilly*, 2022 WL 74162, at *6. For all these reasons, Plaintiff's alleged "crypto ATM market" is facially implausible, meaning that all of Plaintiff's antitrust claims fail as a matter of law.

5. Plaintiff Does Not Allege the Elements of Monopolization and Attempted Monopolization Claims.

Counts 8, 9, 11, and 12 allege that NCR has acquired and maintained a

monopoly, or in the alternative, has attempted to acquire or maintain a monopoly[4] in an alleged "crypto ATM market." A monopolization claim requires allegations that NCR has monopoly power in a plausible relevant market, while an attempted monopolization claim requires allegations of a "dangerous probability of achieving monopoly power" in that market. *DocMagic, Inc. v. Ellie Mae, Inc.*,745 F. Supp. 2d 1119, 1134 (N.D. Cal. 2010). The Complaint fails on both counts.

Even if Plaintiff's relevant market made sense, Plaintiff has failed to plead monopoly power. The Complaint alleges that NCR has monopoly power "in the full-service crypto-ATMs market in California." (FAC ¶ 138), but this claim is contradicted by other allegations. Plaintiff makes conclusory allegations that before the acquisitions, NCR was "a prominent player in the global ATM market with an existing dominant ATM market share in the USA," (FAC ¶ 9), but as Plaintiff alleges, even then, NCR had "**no foothold**" in crypto ATMs. (FAC ¶ 31). Plaintiff's own allegations therefore show that not all ATMs are crypto-ATMs, and more importantly, that NCR's ATMs were not crypto-ATMs. Accordingly, even if true, NCR's alleged "existing dominant market share" in ATMs would not support an allegation of monopoly power in a California "crypto ATM" market.

Plaintiff also does not make any specific allegations as to any NCR market share in a "crypto-ATM" market post-acquisition. Plaintiff alleges that LibertyX held a relatively small number of crypto-ATM merchant accounts, (FAC ¶ 10), but those alone could not give NCR monopoly power. As for Cardtronics, Plaintiff does not actually allege that Cardtronics operates crypto ATMs, only that it provides processing services for LibertyX crypto ATMs (FAC ¶ 8). Plaintiff provides no numbers at all for crypto ATMs operated by Cardtronics, only for Cardtronics' total

[4] To the extent Plaintiff claims the allegedly illegal conduct occurred before the Cardtronics and LibertyX transactions, it also cannot establish that NCR had monopoly power or a dangerous probability of acquiring monopoly power because, by Plaintiff's own admission, NCR had "no foothold" in the market at that time. (FAC ¶ 31).

global ATM business. As discussed above, not all ATMs are crypto ATMs, so Plaintiff's allegations with respect to numbers of ATMs or market share in an ATM market cannot show that NCR has any market power in a "crypto ATM market," let alone a monopoly.

Plaintiff also tries to claim that NCR has monopoly power in crypto-ATMs due to NCR's alleged ability to "set prices for crypto-ATM transactions, control prices, and exclude competitors like USAG" and by "artificially inflating the rates and fees that it charges to consumers." (FAC ¶138 a, c). First, the ability of a company to set prices for the products or services it provides does not constitute monopoly power. *Prime Healthcare Servs., Inc. v. Service Emps. Int'l Union*, No. 11-CV-2652-GPC-RBB, 2013 WL 3873074, at *14-15 (S.D. Cal. July 25, 2013). Second, even if this Court accepted the bald and conclusory allegations that NCR was involved in terminating Plaintiff's contracts, Plaintiff's allegations that it has been "cut out" of its existing contracts with Cardtronics and LibertyX do not show market exclusion. Plaintiff does not allege facts sufficient to show that it has been foreclosed from the market. Plaintiff does not allege that it tried to form contracts with other crypto-currency ATM operators and has been unable to do so due to anything NCR did. Plaintiff has alleged nothing more than the loss of existing contracts, which standing alone, does not demonstrate that a competitor has monopoly power.

Nor can Plaintiff support its allegation that NCR has "artificially inflated the rates and fees it charges to consumers." (FAC ¶¶ 112, 114, 124, 138). Nowhere does Plaintiff make any specific allegations as to the amounts of NCR's fees or rates, let alone information sufficient to plead that NCR has set any rates at artificially high levels. Conclusory allegations of artificially inflated prices do not suffice to allege monopoly power. *Intel Corp. v. Fortress Inv. Grp. LLC*, 511 F. Supp. 3d 1006, 1023 (N.D. Cal. 2021), *appeal filed*, No. 21-16817 (9th Cir. Oct. 28, 2021). Taken together, Plaintiff's allegations do not support a conclusion that NCR

has monopoly power, meaning Plaintiff's monopolization claims fail. *See, e.g.*, *Prime Healthcare Servs., Inc.*, 2013 WL 3873074, at *15 (refusing to conclude that defendant possessed market power absent allegations showing a restriction in output, supracompetitive prices, and a dominant share of the relevant market).

Plaintiff cannot sustain its attempted monopolization claims because Plaintiff fails to plead that NCR has a dangerous probability of acquiring monopoly power. As discussed above, Plaintiff's specific allegations focus on the ATM market only, not the undefined crypto-ATM market Plaintiff alleges. Plaintiff makes no allegations tending to show that NCR has a dangerous probability of going from "no foothold" in crypto-ATM to monopolizing that space. Plaintiff's allegations that NCR has engaged in anticompetitive conduct cannot fill the gap. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (dangerous probability of success element is "plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics."). Accordingly, Plaintiff's attempted monopolization claim fails as a matter of law.

6. Any Claims Involving the Doe Defendants Are Deficient.

To sustain Cartwright Act and Sherman Act conspiracy claims, including conspiracies to monopolize, Plaintiff must plead an agreement between a multiplicity of actors. *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal. App. 4th 1, 10-12 (2012) ; *GDHI Mktg. LLC v. Antsel Mktg. LLC*, 416 F. Supp. 3d 1189, 1205 (D. Colo. 2019). Plaintiff pleads Counts 5-9, 11, and 12 as against NCR and "DOES 1-25," but nowhere does Plaintiff provide any information about the "Does" that would give NCR adequate notice of the conspiracy claim. *Newport Components, Inc. v. NEC Home Elecs (U.S.A.), Inc.*, 671 F. Supp. 1525, 1546 (C.D. Cal. 1987) ("Merely adding unidentified participants . . . does not provide defendants with adequate notice of [plaintiff's] conspiracy claim"). If, as in the original complaint, the Does are "agent, servant, employee, partner, joint venturer, representative, subsidiary, parent, affiliate, alter ego" of NCR or "NCR senior

corporate executives and managing agents," they do not qualify as separate persons as a matter of law, so the Court must dismiss any federal antitrust conspiracy or Cartwright Act claims involving the Doe defendants. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 777 (1984); *Asahi Kasei Pharma Corp.*, 204 Cal. App. 4th at 10-12; *see also In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 320 (N.D. Cal. 2007).

7. Plaintiff's Unfair Competition Claim Fails Because It Has Other Adequate Remedies at Law And Plaintiff Has Failed To Plead Facts Sufficient To State A Claim.

Plaintiff's UCL claim, Count 5, should be dismissed for several reasons. First, this claim must be dismissed because Plaintiff has other adequate remedies at law. "The UCL limits the remedies available for UCL violations to restitution and injunctive relief." *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 452 (2005).[5] A plaintiff in California may only seek equitable relief where no adequate remedy at law exists. *Philips v. Ford Motor Co.*, No. 14-CV-2989-LHK, 2015 WL 4111448, at *16 (N.D. Cal. July 7, 2015). In its Complaint, Plaintiff seeks treble damages for alleged antitrust violations, meaning it cannot seek equitable relief under the UCL. This is true even in cases where, as here, the claims seeking non-equitable relief may not survive a motion to dismiss. *See Rhynes v. Stryker Corp.*, No. 10-5619 SC, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011) ("Where the claims pleaded by a plaintiff *may* entitle her to an adequate remedy at law, equitable relief is unavailable.").

Plaintiff's UCL claim also fails because it failed to plead facts sufficient to sustain the claim as a matter of law. The UCL prohibits companies from engaging

[5] Plaintiff's UCL claim seeks "injunctive relief, restitution, and disgorgement." However, the California Supreme Court has held that individual plaintiffs cannot recover money damages under the UCL, meaning the Court must strike claims for restitution and disgorgement under its UCL claim. *Kor. Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (Cal. 2003).

in any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200; *see also Cel-Tech Commc'ns*, 20 Cal. 4th at 180. Plaintiff has not plead facts sufficient to show that NCR has engaged in any unlawful, unfair or fraudulent business conduct.

Plaintiff must plead facts "sufficient to show a violation of some underlying law" to sustain an "unlawful" UCL claim, which it has not done. *Jackson v. Ocwen Loan Servicing, LLC*, No. 2:10-cv-00711-MCE-GGH, 2010 WL 3294397, at *4 (E.D. Cal. Aug. 20, 2010). As shown here, all of the other legal claims in the Complaint are deficient as a matter of law, so Plaintiff cannot show that NCR has engaged in unlawful conduct sufficient to support a UCL claim. *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1033 (N.D. Cal. 2010).

Plaintiff similarly fails to allege a claim under the "unfair" prong of the UCL, because "where the same conduct alleged to be unfair under the UCL is also alleged to be a violation of another law, the UCL claim rises or falls with the other claims." *Hicks v. PGA Tour, Inc.*, 165 F. Supp. 3d 898, 911 (N.D. Cal. Feb. 9, 2016), *aff'd in part, vacated in part*, 897 F.3d 1109 (9th Cir. 2018). This means that where, as here, the conduct allegedly supporting the UCL claim completely overlaps with the conduct underpinning plaintiff's other claims, the UCL claim fails when those claims fail. *See, e.g.*, *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001) (affirming dismissal of UCL claims where alleged conduct was lawful).

Finally, the Complaint fails the heightened pleading standard of Fed. R. Civ. P. 9(b) which is applicable to the UCL fraud claim. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). A fraud claim must be pled "with a high degree of meticulousness." *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000). Specifically, "plaintiff must include statements regarding the time, place, and *nature* of the alleged fraudulent activities . . . . The plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994). The Complaint utterly fails to meet this

standard and, as with its other UCL claims, Plaintiff cannot sustain a claim based on the UCL's fraud prong.

C. PLAINTIFF'S REMAINING STATE LAW CLAIMS FAIL AS A MATTER OF LAW.

Plaintiff's remaining state law claims, Counts 1 through 4 and 10, also fail as a matter of law. Simply put, the allegations in the Complaint fall well short of sufficiently alleging each claim.

1. Counts One And Two Fail To State A Claim.

Plaintiff's claims for intentional and negligent interference with prospective economic relations fail for several reasons, including that facts alleged relating to NCR cannot support these claims.

To maintain a claim for intentional interference with prospective economic relations, Plaintiff must plead: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Khalil v. Allstate Ins. Co.*, No. 2:20-CV-09409-MCS-JEM, 2021 WL 8315159, at *4 (C.D. Cal. June 28, 2021) (quoting *Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 504 (2011)).

To maintain a claim for negligent interference with prospective economic relations, Plaintiff must allege facts showing that NCR owed it a duty. *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615 (N.D. Cal. 2002) (applying California law). Specifically, Plaintiff must allege facts showing that "(1) an economic relationship existed between the plaintiff and a third party which contained a reasonable probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and

cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to the plaintiff in that the relationship was actually interfered with or disrupted and the plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." *GENFIT S. A. v. CymaBay Therapeutics Inc.*, No. 21-CV-00395-MMC, 2022 WL 195650, at *4 (N.D. Cal. Jan. 21, 2022) (quoting *N. Am. Chem. Co. v. Super. Ct.*, 59 Cal. App. 4th 764, 786 (1997)).

The Complaint alleges nothing more than legal conclusions in support of these Counts. Plaintiff wholly fails to allege facts tending to show that NCR was aware of Plaintiff's relationship with Cardtronics and LibertyX; that NCR was aware or should have been aware that if it did not act with care its acquisitions (which closed months after the end of the relevant business relationships) would interfere with such relationships (which had already ended); that NCR did anything to interfere in those relationships (intentionally or negligently); or that any act by NCR resulted in any actual disruption of the relationship that caused or proximately caused Plaintiff's alleged harm. Nor has Plaintiff alleged facts showing that NCR owed it any duty of care. To the contrary, Plaintiff alleges that NCR did not have any relationship with it and did not participate in the business or market from which Plaintiff's claims arise. *See W. Air Charter, Inc. v. Sojitz Corp.*, No. 18-CV-7361-JGB (KSX), 2019 WL 4509304, at *17 (C.D. Cal. May 2, 2019) (finding that plaintiff "allege[d] no facts concerning Defendants' duty of care" where defendants set up a competing venture).

Further, Plaintiff fails to allege facts showing "that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage." *Crown Imps., LLC v. Superior Ct.*, 223 Cal. App. 4th 1395, 1404–05 (2014); *see also Lange v. TIG Ins. Co.*, 68 Cal. App. 4th 1179, 1188 (1998). The only factual conduct that

Plaintiff alleges regarding NCR is that it acquired two companies that had already stopped doing business with Plaintiff for reasons of their own. There is nothing wrongful about that and Plaintiff has not alleged facts showing otherwise. Moreover, the alleged conduct is privileged as competitive conduct. *See Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners*, 52 Cal. App. 4th 867, 882 (1997) (granting summary judgment for defendant where it "merely competed successfully" by getting a better deal); *see also Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd*., 71 Cal. App. 5th 528, 539 (2021) (holding that the "privilege of free competition" protects a party that entices a third party away from plaintiff absent independently wrongful conduct).

Accordingly, the Court should dismiss Counts 1 and 2. *See Kor. Supply Co.*, 29 Cal. 4th at 1158–1159 (holding that this tort "is not intended to punish . . . commercial entities for their choice of commercial relationships or their pursuit of commercial objectives" absent "independently actionable conduct.").

2. Counts Three and Four Fail To State A Claim.

Plaintiff's claims for unlawful conversion and civil theft fare even worse. "The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." *Soundgarden v. UMG Recordings*, Inc., No. 2:19-CV-05449-JAK-JPR, 2020 WL 1815855, at *21 (C.D. Cal. Apr. 6, 2020) (quoting *Oakdale Vill. Grp. v. Fong*, 43 Cal. App. 4th 539, 543-44 (1996)). This Complaint plainly presents no such circumstances.

Plaintiff does not specifically allege what property interest that it owned or possessed that anyone, much less NCR, supposedly converted. While Plaintiff variously and inconsistently alleges that it possessed some-type of "5% contractual interest" in Liberty X, these allegations are insufficient. (FAC ¶¶ 29, 52, 58, 64); *Soundgarden*, 2020 WL 1815855, at *21 ("[A] mere contractual right of payment, without more, does not entitle the obligee to the immediate possession necessary to

establish a cause of action for the tort of conversion."); *Nguyen v. Stephens Inst.*, 529 F. Supp. 3d 1047, 1058 (N.D. Cal. 2021) ("A generalized claim for money is not actionable as conversion unless there is a specific, identifiable sum involved."). Nor can the allegation that Plaintiff's LibertyX contracts were converted suffice. *See Expedited Packages, LLC v. Beavex Inc.*, No. 15-CV-00721-MMM-AGR, 2015 WL 13357436, at *4 (C.D. Cal. Sept. 10, 2015). Plaintiff's shotgun attempt to allege property in support of this claim relies heavily on contractual rights. (FAC ¶90). While Plaintiff obliquely refers to a proprietary portfolio and information, Plaintiff alleges no facts showing that it owned a portfolio that can be considered property or that anyone converted it. In addition, the Complaint does not allege any facts, as opposed to general conclusions, that NCR did anything wrongful regarding any legally cognizable property of Plaintiff's or that caused Plaintiff some specific damage. Plaintiff's conversion claim should be dismissed.

Plaintiff's civil theft claim should also be dismissed. Plaintiff has wholly failed to allege facts showing that NCR "committed theft as defined by" California criminal law. *GEC US 1 LLC v. Frontier Renewables, LLC*, No. 3:16-cv-01276 YGR, 2016 WL 4677585, at *9 (N.D. Cal. Sept. 7, 2016). The Complaint alleges no facts showing that NCR acted with "specific intent to steal," as required. *Id.* (dismissing civil theft claim because claim does not "redress ordinary business disputes over ownership interests"). The Complaint is similarly bereft of facts alleging any of the other required elements of a civil theft claim. *See Best Fresh LLC v. Vantaggio Farming Corp.*, No. 3:21-CV-00131-BEN-WVG, 2021 WL 5444755, at *12 (S.D. Cal. Sept. 20, 2021) (quoting California criminal theft statute). Plaintiff merely alleges the consequences of Cardtronics and LibertyX ending their business relationships with Plaintiff. Plaintiff nowhere alleges how it lost any business or other interest in LibertyX, much less as a result of any NCR conduct.

3. Count Ten Fails To State A Claim.

Plaintiff's constructive trust claim must be dismissed. A "constructive trust is not a cause of action, but a remedy." *Arouchian v. Bank of Am., N.A.*, No. 12-CV-1028-PSG(DTBx), 2012 WL 12897038, at *3 (C.D. Cal. Oct. 11, 2012) (dismissing cause of action) (citing *Calistoga Civic Club v. Calistoga*, 143 Cal. App. 3d 111, 117 (1983)); *see also Lund v. Albrecht*, 936 F.2d 459, 464 (9th Cir. 1991) ("[A] constructive trust is a remedial device, not a substantive claim on which to base recovery."). Because Plaintiff's claims fail as a matter of law, its claim for a constructive trust also should be dismissed. *See Arena Rest. & Lounge LLC v. S. Glazer's Wine & Spirits, LLC*, No. 17-CV-03805-LHK, 2018 WL 1805516, at *11 (N.D. Cal. Apr. 16, 2018) ("California courts dismiss counts that plead a constructive trust as a cause of action rather than a remedy."). In any event, Plaintiff has not plead sufficient facts to show any entitlement to equitable relief such as a constructive trust. *See Mattel, Inc. v. MGA Ent., Inc.*, 616 F.3d 904, 909 (9th Cir. 2010), *as amended on denial of reh'g* (Oct. 21, 2010) (constructive trust elements).

III. CONCLUSION.

For all of the foregoing reasons, the Court should dismiss the Complaint with prejudice in this case.

DATED: June 17, 2022

Respectfully submitted,

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